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No. 84-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,

Petitioner,

— against —

UNDERWRITER'S AT LLOYD'S UNDER POLICY NO. KL9576986 and ALPINE SHIPPING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LLOYD'S UNDERWRITERS UNDER POLICY NO. KL9576986 IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is there any basis for this Court to review a question of arbitrability where the district court found, as a matter of fact, that the parties had expressly agreed to submit the question to arbitration and where other valid bases exist for sustaining the arbitration award?

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COUNTER-STATEMENT OF THE CASE

The record facts are recited in the opinion of the district judge. (App 6-9)[1] The underlying dispute concerned a cargo claim by Marc Rich & Co. A.G. ("Marc Rich") as bill of lading holder, against petitioner, Clark Oil & Refining Corp. ("Clark"), as carrier and disponent owner of the vessel VOLERE, in respect of a voyage performed in 1979 from Dubai to Bonaire.

Clark never denied the unexplained disappearance of 5,000 barrels – or approximately 210,000 gallons – of Marc Rich's cargo; nor the subsequent increase of Clark's own cargo, also carried on VOLERE. Respondent, Lloyd's Underwriters Under Policy No. Kl9576989 ("Lloyd's"), insured the cargo, paid the insurance and became subrogated to the claim.

[1] References to material included in the Appendices to Clark's petition for certiorari will be identified by "App" followed by the appropriate page reference.

The terms under which Marc Rich's cargo was carried, were embodied in the October 11, 1979 charter party negotiated by Marc Rich's chartering affiliate, Alpine Shipping Company ("Alpine"), with Clark. The charter party contained an arbitration provision of the broadest possible scope.[2] The charter also specifically contemplated issuance of a bill of lading – the agreement between the carrier and the cargo interest – upon terms identical with the charter party and its arbitration provision.

Clark successfully delayed prosecution of arbitration by agreeing to review and respond to Marc Rich's claim. After nearly one year, Marc Rich and Alpine each demanded arbitration with Clark and advised that the demand was also intended to safeguard against the one-year time bar for such claims. Marc Rich's arbitration demand was stated to be made "under the terms of the charter party as incorporated into the Bill of Lading." Clark, through its counsel, agreed to proceed to arbitration and, after seeking and being granted further adjournments, nominated an arbitrator without reserving any rights.

Alpine's right to arbitrate under its charter party with Clark has never been called into question. However, midway through the first hearing and long after expiry of the one-year time bar, Clark, for the first time, questioned the right of Lloyd's/Marc Rich to arbitrate along with Alpine in the proceedings. Clark relied on the self-evident fact that there were no words in the bill of lading expressly incorporating the terms of the charter party or its arbitration provision. This challenge was immediately met with several grounds advanced by Lloyd's in support of "the right of Marc Rich, as bill of lading holder" to arbitrate with Clark. These included Clark's subsequent agreement to arbitrate, waiver and estoppel as well as implied incorporation of charter terms into the bill of lading.[3]

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[2] The charter party called for arbitration in New York of "[a]ny and all differences and disputes of whatsoever nature" arising thereunder.

[3] In addition to these grounds for arbitrating directly against Clark, Marc Rich had separately demanded arbitration, against Alpine, and Alpine, in turn, made a claim against Clark for indemnity in respect of any liability to Marc Rich.

The arbitrators refused to proceed unless the parties agreed to waive their right to try the issue of Marc Rich's standing and to submit it to the panel for final determination.

Clark, after further significant delay, agreed with Lloyd's, in the submission agreement, to submit the issue to the arbitrators. Clark further agreed, that it would not seek to vacate or amend the arbitrators' award on the ground that the arbitrators lacked power to make their determination. The submission agreement provided:

> "The parties agree that the arbitrators have the power to determine these issues and that they will not appeal nor seek to vacate or modify the panel's determinations of these issues except, as the case may be, on the following grounds, namely:"

There follows a list of the grounds in section 10 of the *Federal Arbitration Act*, 9 U.S.C. 10, subsections (a)-(d). Deliberately omitted were the following words in subsection (d): "Where the arbitrators exceeded their powers." The panel – including the most experienced and respected of New York arbitrators – concluded as follows: ". . . that Claimants have presented a thoroughly documented cargo loss claim for which Clark may be found responsible." The award states that "it is the Panel's unanimous decision that Rich is a proper party to this arbitration proceeding and may, along with Alpine, present its claim to this Panel."

1. The District Court Decision

Clark petitioned the District Court to vacate the award on the very ground it had agreed would not be a basis for challenge, namely, that the arbitrators' were not empowered to make their determination that "Rich is a proper party to this arbitration.". Clark contended, as it does now, that the submission agreement presented a very narrow and limited issue to the arbitrators, namely, whether the terms of the charter party and arbitration clause were incorporated into the bill of lading (Clark Brief 6/7); and that the arbitrators exceeded their jurisdiction because they allegedly based their conclusion upon Marc Rich's affiliation with Alpine – an issue which Clark claims it "would

never have consented to submit." (Clark Brief 7) In confirming the award, the district court disagreed and found:

> "Moreover, it is clear from the foregoing recitation of facts that Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder." (App 10(a))

The court also found a number of additional valid bases for the arbitrators' conclusion, including implicit incorporation of charter terms, subsequent agreement by Clark to arbitrate, corporate affiliation, waiver and estoppel. (App 9A)

Finally, the court concluded that Clark "by its own agreement, precluded itself from making the argument that the arbitrators have exceeded their power." (App 10a)

2. The Court of Appeals Decision

The court of appeals affirmed the district court, and awarded Lloyd's double costs indicating that the appeal had been frivolous. (App 2-3a)

The court of appeals relied upon the following findings of the district court: first, Clark's counsel agreed to submit to the arbitrators the issue "whether Marc Rich was entitled to arbitrate with Clark and whether the claims of Marc Rich or Lloyd's could be asserted by Alpine"; second, one of the issues presented in writing to the arbitrators was "whether Marc Rich, as the alleged bill of lading holder ... is entitled to arbitrate its claims in these proceedings directly with Clark" and third, the parties "specifically agreed that they would not challenge the arbitrators' award on the ground that the panel of arbitrators had exceeded its power in deciding whether Marc Rich was a proper party to the arbitration." (App 2a)

Noting that the basic purpose of arbitration should not be frustrated by "overly technical judicial review of arbitration awards," and that "it has long been the rule to resolve any doubt as to the submission agreement in favor of coverage" (*Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389-390 (2d Cir. 1972)), the Court of Appeals

concluded that the district court did not err in holding that Clark was precluded from challenging the arbitration award on the ground the arbitrators exceeded their power. (App 3a)

REASONS FOR NOT GRANTING CERTIORARI

POINT I

None of the Traditional Considerations For Granting Certiorari is Present in This Case

The holding of the courts below that Clark was precluded from challenging the arbitration award on the ground that the arbitrators had exceeded their power is entirely consistent with the express written agreement of Clark and, hence, raises no issue of such national importance as to require consideration by this Court on the merits.

Furthermore, Clark is plainly wrong to urge that the decision of the Second Circuit is in conflict with the decision of the District of Columbia Circuit in *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981). *Davis* stands for the proposition that where the arbitrators' authority to decide an issue is called into question the reviewing court can determine the issue *de novo*. The district court's decision clearly addressed the issue of arbitrability and held that the parties agreed to submit the issue of Marc Rich's standing to the arbitrators for determination.

The facts before the district court in *Davis* were radically different than those in the instant case. Unlike the broad arbitration clause in this case, the arbitration clause in *Davis* was limited to determining the fair market value of the tendered shares and the demand for arbitration "defined the dispute as involving *only* the valuation of the shares." 667 F.2d at 165 (Emphasis by the court). The district court in this case found that the submission agreement contained no language, whatsoever, which restricted the arbitrators' authority solely to consideration of the question of whether the bill of lading technically incorporated the charter party terms.

The respondent in *Davis* did not, as Clark did here, expressly waive the right to challenge the award on the very ground

which later became the basis for appeal. In fact, from the inception of arbitration, the *Davis* respondent repeatedly objected that no arbitrable dispute existed. Clark, on the other hand, waited over a year and a half after receiving the demand for arbitration before suggesting that it might object to arbitrating with Marc Rich. Thereafter, it never advised the arbitrators of its present restrictive interpretation of the submission agreement. As the district court specifically found, "Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder."[4] (App 10a)

POINT II

The Confirmation of the Arbitration Award was Plainly Correct

As the district court also found, even taking Clark's artifically narrow reading of the submission agreement, the arbitrators could have concluded that the bill of lading implicitly adopted and was consistent with the charter party and its arbitration clause under the circumstances of this case. (App 9a)[5]

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[4] Clark's own post-hearing Reply Brief in the arbitration argued that the entire standing issue was before the arbitrators: "[Lloyd's] then negotiated with Clark to waive its right to submit the issues of the parties' standing and their right to arbitrate to the appropriate court, in return for their agreement to submit these issues to the panel." Appendix on Appeal at A-440.

[5] Contrary to Clark's argument (Brief 9 fn. 4), express incorporation was not required. And there were numerous facts supporting the conclusion of implied incorporation. Fundamental federal maritime law relating to contracts of carriage and to arbitration recognizes that a charter party or any other contract of affreightment, need not be agreed to in writing, that it may be agreed orally and that an oral fixture for a voyage may validly incorporate an arbitration agreement, so long as the provision incorporated is, itself, in writing. *Interocean Shipping Co. v. National Shipping and Trading Corp.* 523 F.2d 527, 539 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Christman v. Maristella Compania Naviera*, 349 F. Supp. 845, 854 (S.D.N.Y. 1971) ("Since the fixture was made orally and was binding ... written document drawn up later was without import, except as a memorandum of the terms ... agreed to orally with respect to the fixture."). "It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law." *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

In addition, the district court found other valid bases for the arbitrators' holding that Marc Rich was entitled to arbitrate with Clark:

> "There are other possible bases [besides the affiliation between Marc Rich and Alpine] for the arbitrators' conclusions, e.g., that Clark had implicitly agreed to arbitrate with Marc Rich by participating in the arbitration and responding to the bill of lading holder's demand, or that it was estopped from denying the arbitration demand after the one-year time bar for suits had expired, or that the failure to contest the arbitration demand in a timely fashion had waived any later dispute. It is uncontested that a party who submits a dispute to arbitration can be bound by the results, even though it was not legally required to arbitrate in the first instance." (App 9a)[6]

It is also clear that Clark's failure to advise the arbitrators of its present restrictive interpretation of the submission agreement constituted a waiver of any objection that the arbitrators exceeded their authority. It is fundamental that:

> "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on the grounds not raised before the arbitrator."

United Steelworkers, Etc. v. Smoke-Craft, Inc., 652 F.2d 1356, 1360 (9th Cir. 1981) (failure to object to arbitrating with nonparty to arbitration waived the issue). *See Cook Industries, Inc. v. C. Itoh & Co. (America), Inc.*, 449 F.2d 106, 107-108 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959*, 611 F.2d 1286, 1290 (9th Cir. 1980) (failure to object to arbitrator's bias in arbitration proceeding waived issue).

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[6] It is well settled that an award must be construed in favor of confirmation and to avoid vacatur. *John T. Brady & Co. v. Form-Eze Systems, Inc.* 623 F.2d 261 (2d Cir.), *cert. denied*, 449 U.S. 1062 (1980).

Manifestly, the arbitrators were empowered to render their decision that Marc Rich was entitled to arbitrate with Clark.

CONCLUSION

For the foregoing reasons, respondent Lloyd's respectfully requests that the petition of Clark for a writ of certiorari be denied.

Respectfully submitted,

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